The gold standard?

Neil Robson considers the progress made since the introduction of the UK Bribery Act

It's been just over 10 years since The Bribery Act ('the Act') was introduced in the UK. It was hailed as the 'gold standard' for anti-corruption by its supporters, who had been calling for a much-needed overhaul to the existing legislation. But it wasn't without its critics.

It introduced a new corporate offence whereby any commercial organisation operating in, or based in, the UK that fails to prevent bribery which occurs for its advantage, anywhere in the world, is regarded as breaking the law. This was an attempt to hold corporates and executives accountable and to lead to more convictions, following a spate of high-profile corruption scandals.

However, over the decade that the Act has been in force, the Crown Prosecution Service (CPS) and Serious Fraud Office (SFO) have only prosecuted a few individuals, with most offences under section 7 leading to deferred prosecution agreements (DPAs).

This article considers why the legislation – thought to be some of the toughest in the world – has sought so few convictions in practice.

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An Act fit for the 21st century

Prior to 1 July 2011, when the Bribery Act 2010 came into force, the UK relied on a patchwork set of inadequate and outdated bribery laws, many of which were put in place more than a century ago. As a result, the international community had been calling for the UK to follow the likes of the US, which already had comprehensive laws in this area. HM Treasury responded by drawing on principles from the US Foreign and Corrupt Practices Act (FCPA) of 1977 and other advanced legislation, to put together a new Act fit for the 21st century.

The most notable differences between the Bribery Act and the previous legislation are the introduction of offences of soliciting or accepting a bribe (section 2) and failure to prevent bribery by a corporate entity (section 7).

The latter is what concerns businesses the most. It applies to any person associated with the corporate entity, including employees, third-party consultants, and agents. This new offence can be defended if the organisation can demonstrate that it has put "adequate procedures" in place to prevent bribery from occurring. The Ministry of Justice states that "adequate procedures" comprise of:

- having enforced procedures to prevent bribery
- the top-level management being committed to preventing bribery
- a periodic and documented assessment of exposure to risks to bribery
- applying due diligence procedures
- ensuring bribery prevention policies are understood throughout the organisation, and
- monitoring and reviewing procedures to allow for improvements to be made.

Enforcing the new legislation

Despite the Act now being in its eleventh year, there is very little case law to provide further guidance on what can be considered "adequate procedures".

One example is when interior design company Skansen Interiors Limited was charged with payment of bribes to win a contract in 2018. The former Managing Director had paid £10,000 in bribes to a project manager at a firm responsible for awarding contracts relating to commercial property in London.

Skansen's defence was that, as it was only a small company operating in the UK, its anti-bribery and corruption (ABC) procedures were adequate and proportionate to its size.

The defence seemed strong as the company had made the initial Suspicious Activity Report (SAR) to the National Crime Agency, filed a further report with City of London Police, stopped proposed further payments to the recipient of the bribes, launched an internal investigation, established a new ABC policy, and cooperated with authorities. ►

However, this didn't hold up in Court and Skansen was found guilty under section 7.

Most successful prosecutions under the Act so far have been on this sort of scale, with the first ever conviction being when a magistrates' clerk was sentenced to three years in prison after accepting £500 to not record a parking offence.

The main reason for the lack of judicial guidance is the increased use of DPAs in these situations.

To have any chance of defending a charge under the Act, firms must be proactive with their procedures. Training must teach employees and third parties what is in place to deter non-compliance, so they understand what their responsibilities are and the steps to take to navigate potential risks

The role of DPAs

DPAs are a type of agreement reached between a prosecutor and an organisation, allowing for prosecution to be suspended for a set period of time, as long as the organisation complies with the terms. However, if the organisation in question cooperates with the SFO, the offence they are being charged with may not be prosecuted at all.

By entering into a DPA, the organisation is able to avoid the collateral damage that a conviction may cause, such as job losses, while still making amends for its crimes.

In the UK, DPAs can only apply to organisations and used in cases relating to fraud, bribery, and other economic crime.

Since they became available to prosecutors in 2014, the use of DPAs in anti-bribery legislation has increased. In fact, DPAs were used in two of the UK's most notable anti-corruption and bribery cases – Rolls Royce and Airbus.

In 2017, the SFO fined Rolls Royce close to £500m for committing bribery offences over a 24-year period. It was charged with multiple counts of conspiracy to corrupt and failure to prevent bribes. The section 7 offences related to intermediaries paying bribes to win contracts in Indonesia, Thailand, India, and Russia.

However, by entering into the five-year DPA, Rolls Royce will not be convicted of charges provided it complies with the terms of the agreement – paying the fine, cooperating with authorities, and completing a compliance programme.

At the time, the fine was the largest imposed in UK criminal enforcement history, but it was overtaken by Airbus in 2020, following a 10-year investigation.

The aerospace giant was ordered to pay a £3bn fine after admitting it had used a network of agents to pay bribes to win high-value contracts in 20 countries, including Malaysia, Sri Lanka, Indonesia, Taiwan, and Ghana.

Again, rather than any conviction, Airbus entered into a DPA deferring its prosecution for three years.

Putting adequate procedures in place

With the Skansen case setting the bar so high, there has been a huge increase in the number of professional and financial services firms upgrading their compliance training to include ABC.

To have any chance of defending a charge under the Act, firms must be proactive with their procedures. Training must teach employees and third parties what is in place to deter non-compliance, so they understand what their responsibilities are and the steps to take to navigate potential risks. Significantly, firms should remember that it's too late to implement policies and procedures after the fact.

While the SFO encourages reporting of potential non-compliance, this does not atone for lack of other "adequate procedures" and will not protect companies from being charged under the Act.

It's also no longer uncommon for firms to now take much harder stance on ABC issues, with clauses being added to contracts with all consultants, agents, suppliers, and other third parties.

Theoretically, organisations that do have robust policies and procedures, contractual clauses, and frequent training should be able to show a defence of "adequate procedures" if an individual is accused of bribery, but it's yet to be widely tested. That said, the increased awareness of ABC issues can only be a good thing.

An upscale in compliance

Because of the lack of prosecutions in the UK to date, the House of Lords is currently investigating the efficacy of the Bribery Act 2010.

However, despite that, it does appear that organisations are more aware of ABC issues and taking them more seriously than they did under the archaic laws that they used to be governed by.

Over the past few years, there has been a notable upscale in compliance training across the board. If this proactive behaviour leads to prevention of potential future criminality, rather than prosecution of prior offences, the legislation will be hailed a success.

It's also worth noting that the increased use of DPAs hampers the Act's ability to convict, as we've seen with Rolls Royce and Airbus. Whether the commercial and economic benefits of a DPA outweigh prosecuting a firm for its wrongdoings remains to be seen.

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